STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
Fitzgerald, P.J., Cooper and Wilder, J.J.

FREDA ALIBRI,

Plaintiff-Appellant,

v.

DETROIT WAYNE COUNTY STADIUM AUTHORITY,

Defendant-Appellee.

Supreme Court No. 123091

Court of Appeals No.228921

Wayne County Circuit Court
Case No. 98-818620 CK

/

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/

DEFENDANT-APPELLEE DETROIT WAYNE COUNTY STADIUM AUTHORITY'S BRIEF ON APPEAL

*** * * ORAL ARGUMENT REQUESTED * * ***

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JURISDICTIONAL STATEMENT

On November 13, 2003, this Court granted Appellant's Delayed Application for Leave to Appeal. Defendant-Appellee concurs with Plaintiff-Appellant's jurisdictional statement.

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHERE THE TRIAL COURT LOOKED BEYOND THE PLAIN, UNAMBIGUOUS LANGUAGE OF THE OPTION AGREEMENT AND THE PLAIN, UNAMBIGUOUS LANGUAGE OF THE UNIFORM CONDEMNATION PROCEDURES ACT, DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR IN OVERTURNING THE DECISION?

The Court of Appeals SAY, "NO."
Defendant-Appellee SAYS, "NO."
Plaintiff-Appellant SAYS, "YES."
The Trial Court DID NOT ADDRESS.

II. DID THE COURT OF APPEALS ERR IN FINDING THAT THERE WAS NO INNOCENT MISREPRESENTATION AND NO MUTUAL MISTAKE THAT COULD SUPPORT THE TRIAL COURT'S DECISION?

The Court of Appeals SAYS, "NO."
Defendant-Appellee SAYS, "NO."
Plaintiff-Appellant SAYS, "YES."
The Trial Court SAYS, "YES."

III. WHERE THE TRIAL COURT GRANTED SUMMARY DISPOSITION TO PLAINTIFF-APPELLANT BASED ON FAILURE OF CONSIDERATION, MUTUAL MISTAKE, AND INNOCENT MISREPRESENTATION, DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR IN OVERTURNING THE DECISION?

The Court of Appeals SAYS, "NO."
Defendant-Appellee SAYS, "NO."
Plaintiff-Appellant SAYS "YES."
The Trial Court SAYS, "YES."

IV. DID PLAINTIFF-APPELLANT WAIVE ANY CLAIMS BY EXECUTING AND DELIVERING A DEED FOR HER PROPERTY AND DID THIS ISSUE HAVE TO BE RAISED BELOW?

The Court of Appeals SAYS "YES and "NO."
Defendant-Appellee SAYS, "YES" and "NO."
Plaintiff-Appellant SAYS, "NO" and "YES."
The Trial Court DID NOT ADDRESS.

V. WHERE THE TRIAL COURT RENDERED INCONSISTENT DECISIONS, FINDING FIRST THAT THERE WERE FACTUAL ISSUES FOR TRIAL, THEN FINDING, BASED ON THE SAME INFORMATION, THAT THERE WERE NO FACTUAL ISSUES, DID THE TRIAL COURT COMMIT REVERSIBLE ERROR?

The Court of Appeals SAYS "YES."
Defendant-Appellee SAYS, "YES."
Plaintiff-Appellant SAYS, "NO."
The Trial Court SAYS, "NO."

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COUNTER-STATEMENT OF FACTS

I. INTRODUCTION

This dispute arises as a result of Plaintiff-Appellant, Freda Alibri's ("Plaintiff-Appellant" or "Alibri") desire to obtain a different (and supposedly better) deal after the fact. Timing is critical, yet the Trial Court chose to ignore the timing of certain events. Instead, the Trial Court determined the intent of the parties at the time of contracting by using future events to prove past intent.

Construction of the Detroit Tigers/Detroit Lions dual Stadium Project ("the Stadium Project") in the City of Detroit has been completed. This dispute involves real property acquired by the Defendant-Appellee, Detroit Wayne County Stadium Authority ("Stadium Authority" or "Defendant-Appellee"), for this project.

Plaintiff-Appellant negotiated an agreement to convey, and then voluntarily conveyed by warranty deed, to the Stadium Authority certain real property located in the City of Detroit for the Stadium Project. The Stadium Authority paid Ms. Alibri more than six million dollars ($6,000,000.00) for all of her real estate. In this suit, Ms. Alibri sought to permanently reclaim a portion of the real estate that she voluntarily conveyed to the Stadium Authority.[1] The Trial Court first denied the Stadium Authority's Motion for Summary Disposition, finding (by adopting Plaintiff's brief) that there were factual issues for trial. Six months later, without any additional discovery in the interim, the Court ruled in favor of Plaintiff-Appellant on her

[1]The ability to rescind a portion of an agreement is a questionable legal proposition. *See Livingston v Krown Chemical Mfg*, 394 Mich. 144, 229 NW2d 793 (1975); *Cushman v Avis*, 28 Mich.App. 370, 184 NW2d 294 (1970). In this case, the agreement to sell also included property that is now directly part of the new Comerica Park. Rescission of that portion of the agreement is impossible under these circumstances.

Motion for Partial Summary Disposition, finding that *no genuine issue of fact existed, on the same set of facts.* The Stadium Authority appealed those rulings. The Court of Appeals reversed the Trial Court Order. On November 13, 2003, this Court granted Alibri's application seeking leave to appeal the decision of the Court of Appeals.

II. THE PARTIES

A. Defendant-Appellee The Detroit /Wayne County Stadium Authority

The Stadium Authority is a Michigan building authority incorporated and existing under the laws of the State of Michigan, MCL § 23.951-.965, as amended. The Stadium Authority was created for the public purpose of constructing new stadia for lease to, and use by, the Detroit Lions and Detroit Tigers. The public purposes for which the Stadium Authority was created included the provision of parking for stadiums. *See* MCL § 123.958; (Apx. 2b).

In order to accomplish the objective of obtaining all real property required to construct the Stadium Project, the Stadium Authority, as a political subdivision of the State of Michigan, has the power to acquire property, and interests in property, by purchase, construction, lease, or condemnation. MCL § 123.951-965 (Apx. 3b).

B. Plaintiff-Appellant Freda Alibri

Plaintiff-Appellant Freda Alibri is the former owner of various parcels of properties purchased by the Stadium Authority.[2] Plaintiff-Appellant owned a total of 16 parcels purchased collectively by the Stadium Authority. The properties at issue in this case are located at 171 West Columbia, Detroit, Michigan; 120 West Elizabeth, Detroit, Michigan; 126 West

[2]Certain references in depositions and other materials in this record are made to "he" or "him" with respect to the negotiations. Mr. Alibri was involved in the negotiations, although the properties were owned by Mrs. Alibri.

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Elizabeth, Detroit, Michigan; and 172 West Elizabeth, Detroit, Michigan (all collectively referred to as "Parcel 26"), and 200 West Columbia, Detroit, Michigan (referred to as "Parcel 45"). Parcels 45 and 26 (the "subject properties") are located west of Woodward Avenue. (Apx. 166a).

III. THE STADIUM PROJECT

A. Early Activities

On August 20, 1996, The City of Detroit Downtown Development Authority ("DDA"), the County of Wayne, the Detroit Lions, Inc., and the Detroit Tigers, Inc., entered into a Memorandum of Understanding ("MOU") which, among other things, provided for the construction of two side-by side stadia within the DDA district in downtown Detroit, if certain conditions were met prior to November 1, 1996. The MOU did not identify any specific location for the stadia. (Apx. 2b). On August 21, 1996, the Board of Directors of the DDA approved the MOU. The MOU was a public record. The MOU expressly provided that the Tigers would have "the exclusive right to manage, operate and receive all revenues from all the Project Area Parking... ." (Apx. 3b-24b).

On August 22, 1996, the Wayne County Commissioners approved a Proposal S to be placed on the ballot for the November 5, 1996 General Election in Wayne County seeking voter approval to levy a tax on hotel and rental car gross receipts to support a new baseball stadium to be located near a planned new football stadium to be made available for use by the Detroit Tigers and the Detroit Lions in downtown Detroit, Michigan, to encourage economic development in Wayne County.

It became necessary to provide for the acquisition of property by the Stadium Authority,

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through negotiated purchases with current land owners or by condemnation, if necessary, for facilities for sports, recreational, parking, and other activities and events for the public. (Apx. B 43b-44b).

The MOU provided that the Stadium Project will be constructed within the area of the downtown district of the DDA. (Apx. 13b). The MOU set a deadline of November 1, 1996, for the Stadium Authority to purchase or obtain options for a substantial amount of the property required to construct the stadia east of Woodward or the Lions and Tigers could refuse to proceed with development of the Stadia. (Apx. 26b). The property necessary for the Stadium Project (stadia and parking) required acquisition of property located both east and west of Woodward Avenue in the DDA District. (Apx. 42b-47b).

B. Alibri-Stadium Authority Negotiations

In August 1996, the Stadium Authority began negotiating with Alibri to acquire the subject properties for implementation of the Stadium Project. The Stadium Authority's Resolution of Necessity included the subject properties and other Alibri properties located east of Woodward Avenue as part of the Stadium Project area. At the time of the negotiations with Alibri and her attorney, the Stadium Authority fully intended to acquire the subject properties for parking for the Stadium Project. At all relevant times during the negotiations, the MOU was in place and of public record.

Alibri was aware that certain properties had to be acquired prior to November 1, 1996 for the project to proceed. At the time the Stadium Authority approached Alibri regarding the purchase of her properties, representatives of the Stadium Authority explained to her that enough land had to be acquired quickly in order to get the Detroit Lions and the Detroit Tigers

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to commit to the project and to building the stadia. In order to gain a commitment from the Detroit Lions and Detroit Tigers to this project, the land had to be acquired quickly and within budget to verify the estimated final cost of the project. The Stadium Authority could have simply instituted eminent domain proceedings and guaranteed the acquisition of all necessary property but it would not have had a reasonable estimate on the total land acquisition costs. Therefore, the Stadium Authority chose to continue negotiating with Alibri and her attorney for the purchase of her properties east and west of Woodward Avenue.

During negotiations with Alibri and her attorney, the Stadium Authority showed Alibri the appraisals for the properties the Stadium Authority wished to purchase. (Apx. 49b-64b). Alibri informed the Stadium Authority that the sale price for her property was higher than the appraised value and that her price was non-negotiable. In other words, Alibri refused to sell the property for the appraised value. Because the Stadium Authority could still acquire all of the necessary land within budget and have the Detroit Lions and Detroit Tigers commit to the project, even while paying the higher price demanded by Alibri, the Stadium Authority agreed and purchased the properties. The Stadium Authority and Alibri ultimately entered into an Option for Purchase of Land ("Option Agreement") that included the subject properties. (Apx. 124a).

Prior to entering into the Option Agreement, Alibri expressed concern that the Stadium Authority would refuse to exercise the Option, delay the project, and then try to renegotiate the price for the properties by filing a condemnation case. To address this concern, the Option Agreement guaranteed that if the Option was not exercised by January 3, 1997, the Stadium Authority was barred from commencing condemnation proceedings against the Alibri

properties. The following provision, as drafted by counsel for Alibri, was incorporated into the Option Agreement:

> Optionee agrees that if this Option for Purchase of Land is not exercised, Optionee shall not condemn this Property. It is also agreed that this option is not assignable, without first obtaining optionor's prior written consent. (Apx. 128a).

By demanding the above provision, Alibri effectively prevented the Stadium Authority from ever using its power of eminent domain to acquire the subject properties if the Stadium Authority did not exercise the Option. Moreover, Alibri reserved the assignability of the Option to purchase the properties to herself. These mechanisms allowed Alibri to retain control of the property prior to closing. The Option Agreement did not address control of the property after closing. Alibri never demanded that she retain any control of the property after the closing date. Further, she did not request that a reversionary clause be included in the Option Agreement or the deeds.

Another issue that arose during the negotiations with Alibri related to property located on the west side of Woodward on West Elizabeth street next to Parcel 26 of the subject properties. At the time of the Stadium Authority's negotiations with Alibri, the West Elizabeth property was owned by Nick and Lorna Abraham. Alibri claimed that because the Abrahams were close friends of the then Wayne County Executive, the Abrahams would be able to negotiate a better price per square foot for their West Elizabeth street property if it was purchased by the Stadium Authority or that they would receive more money in a condemnation action than would Alibri. Therefore, Alibri insisted that she be paid an amount for the subject properties that was equal to any amount the Abrahams received from the Stadium Authority for

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select properties at Elizabeth and Park Avenue. (Apx. 128a). This provision assured Alibri of the benefit of any increase in price, based on the price set by an Abraham sale to the Stadium Authority, without the cost or *risk* of a condemnation case with the Stadium Authority. As such, the Option Agreement, again, as drafted by counsel for Alibri, provided as follows:

> [T]he per square foot price paid to Optionor [Alibri] for the property located on the West side of Woodward shall be equal to the price per square foot paid by Optionee [Defendant-Appellee] (which includes the swapping of land or any other form of consideration) to the owners of the Parcel located on Elizabeth and Park Avenue for the property located on Elizabeth and Park Avenue (identified as Ward 2, Item 413). (Apx. 128a)

Nothing in this provision obligates the Stadium Authority to purchase the Abraham property. It simply articulates the consequences of an event; it does not compel the occurrence of the event. Moreover, since the Option Agreement only binds Alibri and the Stadium Authority, it cannot be deemed to bind the Abrahams, a third party. There was no guarantee that the Abrahams would sell their property to the Stadium Authority.

At the time the Stadium Authority approached Alibri regarding the properties in the Stadium Project area, everyone knew that if the Stadium Authority could not make a deal for enough property, the project might not proceed. (Apx. 12b). At that time, the intended use for the subject properties (west of Woodward) was for parking for the Stadium Project. (Apx. 12b and 42b).[3] During its negotiations with Alibri, the Stadium Authority told Alibri that it "intended to acquire the property on the west side of Woodward for the purpose of providing the other 2500 parking spaces." (Apx. 133a). On January 3, 1997, the parties closed the deal

[3]As noted above, the MOU expressly outlined the Tigers' rights *vis-a-vis* the parking concession. It was public knowledge that the Tigers would operate and manage the parking arrangements for the Project. (Apx. 23b-24b).

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transferring the 16 parcels to the Authority for cash.

Alibri and the Stadium Authority voluntarily negotiated and then entered into a private agreement for the sale and purchase of the subject properties. (Apx. 65b). There was no evidence to support the Trial Court's finding that at any time, from October 1996 to January 1997, the Stadium Authority did not intend to acquire Alibri's west of Woodward properties for the Stadium Project.

C. Post-Contract Events

Approximately eighteen (18) months after the Alibri transaction, the Stadium Authority made a decision to downsize the Stadium Project and determined that not all of the property west of Woodward should, or could, be acquired for the Stadium Project. The Stadium Authority based this decision on its evaluation and analysis of (a) the difficulty of using condemnation proceedings, (b) the advent of a decision on the final locations and actual construction sites for the Stadium structures, and (c) a cost-benefit analysis. Sometime in November 1997, the Stadium Authority began evaluating a number of potential options for how to acquire the necessary parking spaces on the West side of Woodward with either no or minimal condemnation. (Apx. 137a and 138a). A few months later, in the Spring of 1998, the Tigers and Lions reached an agreement where the Tigers would provide the Lions with 2500 parking spaces on the west side of Woodward, thereby eliminating the Stadium Authority's need to secure parking on the west side of Woodward for the Stadium Project.

On May 1, 1998, the Stadium Authority approved and adopted a Resolution Rescinding and Releasing the Resolution of Necessity and Declaration of Taking of the Detroit Wayne County Stadium Authority as to Certain Property. (Apx. 165a). This resolution expressly

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excluded property acquired prior to the adoption of the resolution from the rescission. The Stadium Authority subsequently agreed to deed the subject properties to the Detroit Tigers in lieu of repayment of the money it loaned the Stadium Authority to purchase the subject properties. The Tigers were to use the property for parking purposes. (Apx. 156a and Apx. 70b).

IV. PROCEDURAL HISTORY

Plaintiff-Appellant filed her Verified Complaint for Injunctive Relief seeking rescission of her arms-length bargain on June 12, 1998 and filed her Verified Amended Complaint seeking rescission on September 20, 1999. Plaintiff-Appellant requested a jury trial. The Stadium Authority sought summary disposition under MCR 2.116(C)(10). At a hearing on December 10, 1999, the Trial Court denied the Stadium Authority's Motion, adopting as its Opinion the Plaintiff's Brief in Opposition. Likewise, at the hearing on December 10, 1999 on the Stadium Authority's Motion, counsel for Alibri stated: "The point, the point here as you can see, Judge, is there are so many facts in dispute here with regard to what really took place." (Apx. 72b).

Plaintiff-Appellant consistently argued (and the Trial Court adopted Plaintiff-Appellant's arguments) that there were issues of fact that had to be resolved by the trier of fact, in this case the jury. In February, 2000, in its proposed Final Pre-Trial Order, Plaintiff-Appellant listed 37 "Issues of Fact Remaining to be Litigated," including a number of factual issues that the Trial Court apparently resolved in granting Plaintiff's Motion for Partial

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Summary Disposition. The Final Pretrial Order listed 36 issues and estimated a lengthy trial.[4] (Apx. 73b). Yet seven months later, based on the same allegations and set of facts, Plaintiff-Appellant argued that there was no genuine issue of material fact.[5] Incredibly, the Trial Court agreed. The Court of Appeals disagreed and reversed the Trial Court on December 27, 2002:

> Neither the evidence nor the law supports the trial court's determination that failure of consideration, mutual mistake or innocent misrepresentation warranted rescission of the sale of the subject property. Because there are no material facts in dispute, we conclude that defendant, rather than plaintiff, was entitled to judgment as a matter of law. (Apx. 80a)

On June 9, 2000, Plaintiff-Appellant filed her Motion for Partial Summary Disposition under MCR 2.116(C)(9) and (C)(10). Plaintiff-Appellant merely took the same set of "facts" and characterized certain of them as having been "admitted" by the Stadium Authority. No discovery took place between the December, 1999 hearing and the hearings on Alibri's motion. At hearings on June 30, 2000 and July 11, 2000, the Trial Court ultimately ruled that a portion of the contract for the sale of the property should be rescinded on the bases of misrepresentation, mutual mistake, and failure of consideration, to the extent that it relates to

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[4]The Final Pretrial Order is a 47-page document, signed by both parties and entered by the Trial Court on February 10, 2000. Issue of Fact Remaining to be Litigated No. 4 related to the issue of the contingency regarding the Abraham property and the Stadium Authority's alleged representation. (Apx. 96b). Issue of Fact No. 13 related to the Stadium Authority's "intent." (Apx. 97b). Issue of Fact No. 14 involved the Stadium Authority's state of mind and intent, as did Nos. 15 and 34. (Apx. 98b & 102b). Issue of Fact No. 19 involved the Stadium Authority's "belief." (Apx. 99b).

[5]In her Brief on Appeal to this Court, Plaintiff-Appellant continues this pattern of making inconsistent factual and legal allegations and arguments. In addition to articulating inconsistent facts and arguments, Plaintiff-Appellant has materially changed facts and raised new arguments that were not raised to the Trial Court. These new characterizations of the facts and new arguments, which will be identified by the Stadium Authority throughout this brief, are a blatant violation of Michigan's long standing appellate review rule that an issue that was not raised, addressed or decided in the Trial Court is not preserved for appellate review. *ISB Sales Co. v Dave's Cakes,* 258 Mich. App. 520, 533, 672 NW2d 181 (2003). Notably, one of Plaintiff-Appellant's claims on appeal is that the Court of Appeals considered questions that were not presented to the Trial Court. Despite acknowledging the impropriety of an appellate court engaging in such conduct, Plaintiff-Appellant is asking this Court to consider "new" facts and arguments that were not presented to the Trial Court by Plaintiff-Appellant.

the "west side properties." The Court adopted in its entirety an opinion written by Plaintiff-Appellant.[6] The Trial Court apparently relied on MCR 2.116(C)(10). In summary, the Trial Court made the following rulings:

1. There was a failure of consideration for the Option Agreement between the Stadium Authority and Alibri because the Stadium Authority never subsequently purchased the neighboring properties owned by the Abrahams and Potestivo.

2. There was a failure of consideration for the Option Agreement because the Stadium Authority expressed its intent to condemn when it did not have funding or a plan in place.

3. There was a mutual mistake of fact as to the ability of the Stadium Authority to condemn immediately.

4. There was a mutual mistake of fact regarding the belief that the Stadium Authority *would* purchase the Abraham and Potestivo properties.

5. There was innocent misrepresentation by the Stadium Authority regarding its ability to condemn immediately.

6. There was innocent misrepresentation by the Stadium Authority regarding its intent to purchase the Abraham and Potestivo properties and its ability to do so. (Apx. 56a-67a).

The Trial Court's ruling ignored the plain, unambiguous language of the contract and imposed terms and conditions not contemplated by the parties, using post-contract changes in circumstances to evidence the "intent" of the parties at the time of execution of the contract. The Trial Court also made explicit factual findings regarding the Stadium Authority's "intent," a matter that (if relevant) was, and is, disputed and that should have been left to the trier of fact (in this case, the jury). The Trial Court committed manifest error in making factual

[6]The Trial Court rejected the Stadium Authority's proposed version of the Order. (Apx. 119b).

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determinations that should have been left to the jury.[7]

The Trial Court dismissed the remainder of Plaintiff-Appellant's claims.[8] The Trial Court further ordered the transfer of the underlying properties by issuance of a warranty deed for the benefit of Alibri. (Apx. 66a). On August 4, 2000, Ms. Alibri, through her counsel, tendered a deed and a check to the Stadium Authority.

On July 31, 2000, Defendant-Appellee filed its Claim of Appeal with the Court of Appeals. On August 22, 2000, pursuant to MCR 7.208 and 7.209, Defendant-Appellee filed a Motion with the Trial Court seeking a stay of the Order of July 11, 2000, pending resolution

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[7]The Trial Court also engaged in an "editorial" banter that suggests that its result was pre-ordained:

> The Court further finds that it is not good policy for a governmental entity with powers of eminent domain to threaten condemnation if a sale of the property is not reached with the property owner, and to then borrow the money from another private entity developer in the area, and then to repay the loan by transferring the purchased property to the private entity developer who loaned the money. (Apx 66a).

The Trial Court reiterated its views on condemnation at the hearing on July 11, 2000:

> This court has previously voiced much concern about taking private property for "public purposes" when the public purposes ends up really being private purposes. That's the court's view but the Legislature has spoken and the Legislature has recognized and courts have recognized that such projects as Pole Town, the Fox Theater are "public purposes" for purposes of the taking.
>
> While this court disagrees with that view, while this court thinks that view is – well, let me just back up. While this court disagrees with that view, the court is familiar with the cases that say it's proper and legal.
>
> * * * *
>
> Let me indicate further for the record my comments just now were separate and apart from the order. The order speaks the court's view. My comments were more in terms of editorial comments than anything else. (Apx. 139b-140b).

The appropriateness of the Trial Court's comments may be questioned. At a minimum, such comments raise a strong inference that the Trial Court was predisposed to rule against the Stadium Authority. This is true especially in light of the Trial Court's improper fact-finding and contradictory rulings. The commentary goes beyond merely explaining procedures of the court or the Judge's holdings or actions. It was a clear enunciation of an obvious bias against the state of the law and condemning authorities.

[8]Alibri's other claims included fraud and state and federal due process claims. Plaintiff-Appellant did not cross-appeal the dismissal of these claims and therefore, the dismissal is *res judicata*.

of Defendant-Appellee's Appeal. At a hearing on the Motion for Stay on September 15, 2000, the Trial Court denied the Stadium Authority's Motion. On September 29, 2000, the Trial Court entered its Order denying the requested stay. The Court of Appeals denied the Stadium Authority's Motion for Peremptory Reversal and for Stay. On December 27, 2002, the Court of Appeals reversed the Trial Court and granted judgment in favor of the Stadium Authority pursuant to MCR 2.116(I)(2) and MCR 7.216(A). (Apx. 71a). On November 13, 2003, this Court granted Plaintiff-Appellant's application for leave to appeal.

ARGUMENT

I. STANDARD OF REVIEW

This Court and the Court of Appeals should review the Trial Court's decision *de novo*. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition, a Trial Court may consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(G)(5); *Maiden v Rozwood,* 461 Mich. 109, 597 NW2d 817 (1999). In reviewing a decision on a (C)(10) motion, this Court and the Court of Appeals "...[review] summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law." *Hughes v PMG Bldg,* 227 Mich.App. 1,4, 574 NW2d 691 (1997)*(citing Marx v Dep't of Commerce,* 220 Mich.App. 66, 70, 558 NW2d 460 (1996)).[9] As the Court of Appeals has stated:

[9]The Court of Appeals presumed that the Trial Court's ruling was based on MCR 2.116(C)(10), even though Plaintiff-Appellant brought it under both MCR 2.116(C)(9) and (C)(10). A motion brought under MCR 2.116(C)(9) seeks a determination of whether the opposing party has failed to state a valid defense to the claim asserted against it. Only the pleadings may be considered when the motion is brought under MCR 2.116(C)(9). MCR 2.116(G)(5); *see Nicita v City of Detroit,* 216 Mich.App. 746, 750, 550 NW2d 269 (1996); *Lepp v Cheboygan Area Schools,* 190 Mich.App. 726, 476 NW2d 506 (1991). The Trial Court clearly considered more

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> We review a Trial Court's decision regarding a motion for summary disposition de novo, examining the entire record and construing all reasonable inferences arising from the evidence in a light most favorable to the nonmoving party. *Henderson v. State Farm Fire & Casualty Co., 225* Mich.App. 703, 708-709, 572 N.W.2d 216 (1997); *Pinckney Community Schools v. Continental Casualty Co.,* 213 Mich.App. 521, 525, 540 N.W.2d 748 (1995). A motion pursuant to MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Henderson, *supra*. Stated otherwise, we ask whether a record might be developed that leaves open an issue upon which reasonable minds could differ. *Id. Critically, the court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition. Id.*

Morris v Allstate Ins Co, 230 Mich.App. 361, 364, 584 NW2d 340 (1998)(emphasis added); *see also Paul v US Mut Financial Corp*, 150 Mich.App. 773, 779, 389 NW2d 487 (1986) ("However, the trial court must avoid substituting a trial by affidavit and deposition for a trial by jury. A court is not allowed to make findings of fact or to weigh the credibility of affiants or deponents.")(citation omitted).

In a case of equitable relief, such as the instant action for rescission, appellate courts also review the lower court's decision on a *de novo* basis. *Harris v Axline*, 323 Mich. 585, 589, 36 NW2d 154 (1949). In this case, the Trial Court committed reversible error by looking outside the contract and making findings of fact on issues of tangential or collateral import.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT ERRED AS A MATTER OF LAW IN MISCONSTRUING THE PLAIN, UNAMBIGUOUS LANGUAGE OF THE OPTION AGREEMENT.

In granting Partial Summary Disposition to Plaintiff-Appellant, the Trial Court made

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than the pleadings here and the Court of Appeals' conclusion on this issue is correct. (Apx. 71a).

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two basic, underlying findings:

1. At the time of execution of the Option Agreement, the Stadium Authority did not have the ability to condemn Plaintiff-Appellant's property; and

2. At the time of execution of the Option Agreement, the Stadium Authority did not intend to purchase the Abraham property.

The Trial Court then foisted three legal theories - lack of consideration, mutual mistake, and innocent misrepresentation - on these two erroneous determinations. As a matter of law, the Trial Court committed reversible error in making these two findings. The Court of Appeals accepted this basic understanding of the Trial Court's errors.

A. The Court of Appeals Correctly Concluded That The Trial Court Misconstrued the UPCA.

As acknowledged by the Court of Appeals, the sole basis for the first finding - lack of ability to condemn - is based on a fundamentally improper construction of the UPCA, MCL §213.51, et seq. The sole basis for Plaintiff-Appellant's argument and the Trial Court's decision was the allegation that the Stadium Authority could not have condemned the Alibri property because it did not have funding in hand or a plan in place at the time of execution of the Option Agreement as supposedly required by the UCPA.[10] Plaintiff-Appellant relied on

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[10]While this was the basis for Plaintiff-Appellant's argument to the Trial Court, the Court of Appeals and to this Court in her Application for Leave to Appeal, Plaintiff-Appellant has changed her argument to include a new allegation that was not raised below. In her Brief on Appeal to this Court, Plaintiff-Appellant for the first time claims that, in addition to funding and a plan, the Stadium Authority also had to demonstrate an intended use for the property. Plaintiff-Appellant may not raise issues before this Court that were not raised and preserved in a lower court. *ISB Sales Co. v Dave's Cakes,* 258 Mich. App. 520, 533; 672 NW2d 181 (2003). Neither the Trial Court nor the Court of Appeals considered whether the UCPA required the Stadium Authority to demonstrate "an intended use for the property" at the time it engaged in negotiations with Alibri for her property. Accordingly, this Court should not consider Plaintiff-Appellant's new argument that the UCPA required the Stadium Authority to demonstrate an intended use for the property.

Moreover, even if Plaintiff-Appellant had previously raised this issue, the Stadium Authority relies on its argument *infra* that the UCPA does not require the Stadium Authority to demonstrate an intended use for property during negotiations and before an actual condemnation complaint is filed. Further, even if the UCPA imposed such

MCL § 213.55(4)(a) and (5) in support of its argument. The July 11, 2000 Order provides, in part:

> At the time the Stadium Authority threatened Plaintiff with condemnation, the Stadium Authority did not have the funding available to purchase the underlying properties and did not have a plan in place to use the underlying properties in the Stadium Project.

(Apx. 62a). The Order is replete with similar statements. *See, also* (Apx. 134b-137b).

Plaintiff-Appellant's and the Trial Court's reading of the UCPA is clearly erroneous as determined by the Court of Appeals.[11] The UCPA requires "funding" and "a plan" *at the time of the filing of a complaint for condemnation.* MCL § 213.55(4) provides in relevant part:

> In addition to other allegations required or permitted by law, *the complaint shall contain or have annexed to it all of the following:*
>
> (a) A plan showing the property to be taken.
>
> (b) A statement of purpose for which the property is being acquired, and a request for other relief to which the agency is entitled by law. (Emphasis added).

MCL § 213.55(5) provides in relevant part:

> *When the complaint is filed*, the agency shall deposit the amount estimated to be just compensation with a bank, trust company, or title company in the business of handling real estate escrows, or with the state treasurer, municipal treasurer, or county treasurer. (Emphasis added).

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a requirement on the Stadium Authority, Plaintiff-Appellant's argument still fails because the Stadium Authority's intention that the subject property would be used for parking for the Stadia was set forth in public records and had also been expressly set forth to Alibri. (Apx. 12b).

[11]The Trial Court's conclusion makes certain speculative presumptions regarding the length of time it would take the Stadium Authority to have a plan and estimated just compensation money in hand. There is no legal or factual basis for such speculation. Further, whether it takes a condemning authority a day or a year is irrelevant as long as such items are ready at the time of the filing of a complaint.

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The plain language of the statute is clear: until a complaint is filed, a condemning authority need not have a plan in place or money in hand. In this case, there was no complaint for condemnation filed (nor could there have been because of the language of the Option Agreement).[12]

The Trial Court's finding that a condemning authority must have a plan in place and funding in hand *prior to* the filing of a condemnation complaint turned the statutory language on its head. The Court of Appeals properly concluded that this alleged misrepresentation was superfluous: "[and] therefore defendant's 'present ability' to immediately file a condemnation complaint is immaterial." (Apx. 75a).

The Trial Court's decision violated fundamental principles of statutory construction and constituted clear reversible error. This Court has ruled:

> The 'cardinal rule' of statutory construction is to identify and give effect to the intent of the Legislature. *Shallal v Catholic Social Services* 455 Mich. 604, 611, 566 NW2d 571 (1997); *Turner v Auto Club Ins. Ass'n.* 449 Mich. 22, 27, 528 NW2d 681 (1996). The first step in discerning intent is to examine the language of the statute. *Id* The language is to be read according to its ordinary and generally accepted meaning. *Shallal, supra.* at p. 611, 566 NW2d 571. Judicial construction is authorized only when the statute lends itself to more than one interpretation. *Id.* When statutory language is clear and unambiguous, the court must honor the legislative intent as clearly indicated in that language and no further construction is required or permitted. *Western Michigan Univ. Bd. of Control v. Michigan,* 455 Mich. 531, 538, 565 NW2d 828 (1997); *Turner, supra,* at p. 27, 528 NW2d 681. Therefore, where the statute is clear on its face, 'the role of the judiciary is not to articulate its view of 'policy', but

[12]In the Final Pretrial Order, Plaintiff-Appellant argued that the Stadium Authority's financial records showed that the Stadium Authority had plenty of funds available at the time of the execution of the Option Agreement. (Apx. 123b and 124b). Yet again a few months later, Plaintiff-Appellant argued for, and the Trial Court adopted, a finding that the Stadium Authority did *not* have funds available at the time of the execution of the Option Agreement.

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> to apply the statute in accord with its plain language.' *Rogers v Detroit,* 456 Mich. 125, 140, 579 NW2d 840 (1998).

Helder v Sruba, 462 Mich. 92, 99, 611 NW2d 309 (2000)(adopting and quoting dissenting opinion in Court of Appeals). Here, as the Court of Appeals found, the Trial Court erred as a matter of law on the issue of the ability of the Stadium Authority to condemn the subject property. Thus, fully one-half of the Trial Court's Order failed on this ground.[13]

B. The Court of Appeals Was Right to Reverse the Trial Court's Flawed Interpretation of the Option Agreement.

The second basis for the Trial Court's decision - the Stadium Authority's intent to purchase the Abraham property - similarly fails as a matter of law. The Trial Court should have given effect to the plain and unambiguous language of the Option Agreement.

The Option Agreement is clear: Alibri's price per square foot for the west side properties would be *equal* to the per square foot price paid by the Stadium Authority to the Abrahams. (Apx. 124a). This language clearly set up a contingency; it was operative only in the event that the Stadium Authority purchased the Abraham property. There was no obligation or commitment by the Stadium Authority to purchase the Abraham property (nor could there be since the Abrahams could not be obligated to sell to the Stadium Authority through the Option Agreement). Nor did the Stadium Authority so commit.

The Trial Court's decision ignored the plain language of the Option Agreement and used the subsequent decision of the Stadium Authority not to buy the Abraham's property as a hook to look beyond the language of the contract. The Court of Appeals correctly concluded that the

[13]The label attached to this issue - failure of consideration, mistake, or misrepresentation - is irrelevant because the underpinning of all three theories fails as a matter of law if the concept is irrelevant. (Apx. 71a).

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Trial Court's decision was erroneous: "[Nowhere] does the contract require defendant to purchase the other property." (Apx. 76a).

The principles of contract and statutory construction are similar and equally persuasive. Where contract language is clear, as here, a court should give the language its plain and ordinary meaning and should not look beyond that unambiguous language. *See Michigan Nat'l Bank v Laskowski*, 228 Mich.App. 710, 580 NW2d 8 (1998); *Central Transport v Fruehauf,* 139 Mich.App. 536, 362 NW2d 823 1984). The plain language of the Option Agreement never required that Stadium Authority acquire the Abraham property. "The trial court erred in its interpretation of the option contract." (Apx. 76a).

C. As the Court of Appeals Held, Source of Funding Should Not Have Been An Issue.

The Trial Court and Plaintiff-Appellant seemed highly concerned with the source of certain funding for the Stadium Project (*i.e.,* the Detroit Tigers). As has been discussed, the Tigers were to operate parking lots under an agreement with the Stadium Authority. Revenues from parking operations would pay for financing bonds. Any money loaned by the Tigers to the Stadium Authority was an advance on the parking revenues.

Fundamentally, however, the source of funding is irrelevant in this case. The law has long been established that an acquisition funded in whole or in part by a private party does not invalidate the public necessity of the acquisition. *See Union Lime Co v Chicago & Northwestern R Co,* 233 US 211, 34 S Ct 522 (1914); *Pere Marquette R Co v United States,* 154 Mich. 290, 117 NW 733 (1908); *McDonald v Marquette Circuit Judge, 159 Mich. 367, 123 NW 1112 (1909); In re Condemnations for Improvement of the Rouge River,* 266 F 105 (ED

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Mich. 1920). The Building Authority statute, MCL 123.951 et. seq., provides that parking for use in connection with a stadium is a public purpose:

> The acquisition of any building or buildings, *automobile parking lots* or structures, recreational facilities, stadiums, and the necessary site or sites for the property, together with appurtenant properties and facilities by any authority . . . constitutes a benefit to and a legitimate public purpose of the authority and the incorporating unit or units. MCL 123.958 (emphasis added).

The Court of Appeals agreed with these axiomatic principles of law. (Apx. 75a).

III. THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S ORDER GRANTING SUMMARY DISPOSITION BASED ON MUTUAL MISTAKE OF FACT.

The Trial Court improperly found that there were mistakes of "fact" related to the ability to condemn immediately and related to the Stadium Authority's intent to purchase the Abraham property. Simply put, the Court of Appeals concluded that there were no mistakes of fact with respect to these matters.

Courts have held that a contract may be rescinded because of mutual mistake of the parties. However, such rescission is an equitable remedy which will be granted only in the sound discretion of the Trial Court. *Dingerman v Reffitt,* 152 Mich.App. 350, 355, 393 NW2d 632 (1986). For a mistake to mandate rescission, there must have been a belief by one or both of the parties that is not in accord with the facts. Additionally, the erroneous belief must relate to a basic assumption of the parties upon which the contract is made and must materially affect the agreed upon performances of the parties. *Shell Oil Co v Estate of Kert,* 161 Mich.App. 409, 421-23, 411 NW2d 770 (1987).

The parties were under no mistaken belief when the Stadium Authority sought to purchase the Alibri property for the Stadium Project. The Duggan testimony cited previously confirms that there is no evidence to support a claim of mutual mistake. (Apx. 133a).

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Specifically, the Stadium Authority, at the time of the purchase of the subject properties, intended to (as opposed to was going to) purchase all of the west side of Woodward properties, which are included in the Resolution of Necessity and Declaration of Taking, for the Stadium Project. (Apx. 42b). Further, as the Court of Appeals expressly held: "[nowhere]" does the contract require defendant to purchase the other [Abraham] property." (Apx. 76a).

It is clear that there was no mistake of fact between the parties at the time the purchase of the subject properties by the Stadium Authority was negotiated. Duggan's testimony is clear that the Stadium Authority intended to pursue all of the properties west of Woodward in order to provide sufficient parking for the Stadium Project. There was no obligation or commitment to purchase the Abraham property. (Apx. 76a). Alibri cannot produce any evidence that this real estate sale was based upon mutual mistake because there is no such evidence. (Apx. 133a-134a).

Alibri's position on the first mistake of fact – the absence of the authority to immediately condemn is based upon a flawed interpretation of MCL 213.55(15). The requirements for filing a complaint are not prerequisites to negotiations. (Apx. 75a).

Further, at the time of the negotiations, Alibri insured that the Stadium Authority could not exercise its authority to condemn her properties by specifically negotiating and including such a provision in the Option Agreement. Alibri cannot now claim invalidity of the Resolution of Necessity, thus challenging any condemnation action by the Stadium Authority, when she specifically contractually barred the Stadium Authority's power to undertake the action. At the time of the negotiations, the subject properties were to be used for parking spaces within the Stadium Project. The testimony of Michael Duggan, makes clear what took place between the parties during the negotiations. There was no evidence to contradict the testimony of Mr.

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Duggan. At best, the Trial Court should have held a trial on these issues.

It is obvious that there are extreme costs related to the implementation and construction of the Stadium Project. At the time of the closing on the Alibri properties, the Stadium Authority had available funding for the purchase of the Alibri east side properties but it had no funding yet in place to purchase any property on the west side of Woodward. With respect to the funding mechanisms for the Stadium Project, Michael Duggan testified that contributions from the State of Michigan, the DDA and Wayne County were allocated to acquisition and the infrastructure of the Stadia. While the Stadium Authority anticipated that the Alibri west side properties would be used for parking, it did not have funding to purchase those properties. (Apx. 131a-132a). To acquire the money needed to purchase the west-side properties for parking, the Stadium Authority obtained a loan from the Detroit Tigers. This fact, however, does not negate the validity of the Stadium Authority's actions. As noted infra, Michigan courts have upheld a private entity providing financing for an acquisition as long as the acquisition is for a public purpose. *See Union Lime Co v Chicago & Northwestern R Co,* 233 US 211, 34 S Ct 522 (1914); *Pere Marquette R Co v United States,* 154 Mich. 290, 117 NW 733 (1908); *McDonald v Marquette Circuit Judge,* 159 Mich. 367, 123 NW 1112 (1909); *In re Condemnations for Improvement of the Rouge River,* 266 F 105 (ED Mich. 1920). The MOU expressly provided that the Detroit Tigers would utilize the properties west of Woodward for parking. (Apx. 23b-24b). Whether the west side properties were operated and managed by the Stadium Authority or the Detroit Tigers is irrelevant as long as the properties were used for public parking in connection with the Stadia.

The Duggan testimony makes clear that Alibri had the lead and directed the negotiations for the sale of the Alibri properties. The Detroit Tigers advancing the Stadium Authority the

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funds used to purchase the subject properties cannot be construed as a fraudulent statement or misrepresentation since the MOU in place at the time of the Alibri purchase provided that expenses for the west side properties would be the responsibility of the Detroit Tigers. (Apx. 23b-24b). Plaintiff-Appellant's assertions and the Trial Court's ruling were unfounded and not supported by any evidence.

Plaintiff-Appellant criticizes the Court of Appeals *ad nauseam* for not distinguishing its mutual mistake cases. However, the Court of Appeals did not need to distinguish those cases once it ruled on and rejected Plaintiff-Appellant's flawed premise. Here, the Court of Appeals found that there was no mistake – mutual or otherwise. (Apx. 78a). In contrast, in *Kroninger v Anast,* 367 Mich. 478, 116 NW2d 863 (1962), there was a mutual mistake regarding what uses the City of Pontiac would allow on the property. This point was not contested. Similarly, in *Schmude v Omar Operating,* 184 Mich.App. 574, 458 NW2d 659 (1990), there was a mistake about how much land was actually owned, which was not contested. In *Converse v Blumrich,* 14 Mich. 109, 90 AmDec 230 (1866), this Court concluded that the mortgage to be set aside was procured with false statements or mutual mistakes. Here, the Court of Appeals simply found that there were no false statements or mutual mistakes. Moreover, Alibri had constructive notice of Tigers' role with regard to Stadia-related parking. See *Converse, supra.*

Finally, a mistake must be of a *current* fact in existence at the time of execution of the contract. See Court of Appeals Opinion, citing *Lenawee County Bd of Health v Messerly*, 417 Mich. 17, 331 NW2d 203 (1982).[14] In this case, the Trial Court found an alleged mistake

[14]This Court articulated this rule:

> A contractual mistake "is a belief that is not in accord with the facts". 1 Restatement *Contracts,* 2d, § 151, p. 383. The erroneous belief of one or both of the parties must relate to a fact in existence at the time the contract is executed. *Richardson Lumber Co. v Hoey,* 219 Mich. 643, 189 N.W. 923 (1922); *Sherwood v. Walker,* 66 Mich. 568, 580, 33 N.W. 919 (1887)

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regarding a future event (or non-event as the case may be). That circumstances may change in the future cannot be bootstrapped to reach a conclusion regarding "facts" at the time of execution of the Option Agreement. There was no commitment to buy any property west of Woodward.

Plaintiff-Appellant's position regarding the Court of Appeals alleged rewrite of the Option Agreement belies the record. The Court of Appeals did not rewrite anything; it simply did not insert a concept that Alibri wants to interject into the contract after the fact – the Stadium Authority must, and agreed to, purchase the Abraham property. Plaintiff-Appellant cites *Purlo v 3925 Woodward Ave., 342 Mich. 483, 67 NW2d 684 (1954)*, for the proposition that: "A court is forbidden form supplying materials provisions that are absent from a clear and unambiguous writing." Alibri Brief at p. 27. Setting aside the inaccuracy of the cite for the proposition in question, Alibri, for once, at least properly characterized the issue. The Court of Appeals refused to supply a material provision (the Stadium Authority's obligation to buy the Abraham property) which was absent from the Option Agreement.

Alibri's continued reliance on *Solomon v Western Hills Development Co.*, 88 Mich.App. 254, 276 NW2d 577 (1979), is misplaced. Contrary to Alibri's position, the Agreement does not say "when" the Abraham property is purchased. Therefore, unlike *Solomon*, the Agreement

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> (Sherwood, J., dissenting). That is to say, the belief which is found to be in error may not be, in substance, a prediction as to a future occurrence or non-occurrence. *Henry v Thomas,* 241 Ga. 360, 245 S.E. 2D 646 (1978); *Hailpern v. Drylen,* 154 Colo. 231, 389 P.2d 590 (1964). *But see Denton v. Utley,* 350 Mich. 332, 86 NW2d 537 (1957).

331 NW2d at 207. In that case, the Court ruled that the parties "erroneously assumed that the property transferred by the vendors to the vendees was suitable for human habitation and could be utilized to generate rental income." *Id.* at 210. Nonetheless, the Court reversed the decision rescinding the contract after finding that the vendee assumed the risk of loss.

In the instant case, the Trial Court's decision was not founded on a mistake regarding any fact in existence at the time of execution of the Option Agreement. Rather, contrary to the teaching of *Messerly*, the Trial Court's decision, at best, was based on a "prediction as to a future occurrence or non-occurrence," *i.e.*, the purchase by the Stadium Authority of the Abraham property.

in the case extant does not contain a "clause [that] is susceptible to the interpretation that the plat will be recorded (or here that the property will be purchased) at some unknown time in the future." The Option Agreement is silent on this issue. Alibri is fully aware of that fact. That fact (the absence of language compelling a purchase) drove the Court of Appeal's decision on this issue. Here, unlike *Worker's Comp Bureau v Durant,* 195 Mich.App. 626, 491 NW2d 584 (1992) cited by Alibri, there are no words that support or contradict the Trial Court. The concept was created from whole cloth by Alibri. It did not exist as the Court of Appeals held.

In fact, the Alibri provision is more akin to the letter of intent in *Opdyke Inv. Co. v Noms Grain Co.,* 413 Mich 354, 320 NW2d 836, 838 (1982), where this Court held:

> Similarly, if the agreement is conditioned on the happening of a future event that, through no fault of parties never happens, liability does not attach.

See also *Professional Facilties Corporation v Marks,* 373 Mich 673 (1964), where this Court addressed a suit to compel payment of a two percent of a commitment that was allegedly due:

> The agreement, if any of defendants to pay plaintiff, as expressed in the words 'Two (2%) percent of the amount of the funds requested or accepted' could never ripen into an obligation to pay until defendants should request or accept funds... .
> There is no allegation that defendants ever requested or accepted a certain amount. The conditions upon which defendants' liability for a fee were to depend are not alleged to have been fulfilled at any time. *Id* at 131 NW2d 62.

Here, Plaintiff-Appellant has never alleged that the D/WSCA purchased the Abraham property. The obligation to pay an equal amount could not ripen into a right for Alibri.

IV. THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S ERROR OF GRANTING SUMMARY DISPOSITION BASED ON INNOCENT MISREPRESENTATION

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered inures to the benefit of the party

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who made the representation. *United States Fidelity & Guaranty Co v Black,* 412 Mich. 99, 118, 313 NW2d 77 (1981). The innocent misrepresentation doctrine represents a species of fraudulent misrepresentation but has as its distinguishing characteristics, the elimination of the need to prove:

> (i) a fraudulent purpose or an intention on the part of the defendant, (ii) the misrepresentation was acted upon by the plaintiff (iii) an unintendedly false representation was made in connection with the making of a contract and (iv) the injury suffered as a consequence of the misrepresentation inured to the benefit of the party making the misrepresentation. *Id.* at 118; see also *State-William Partnership v Gale,* 169 Mich.App. 170, 178, 425 NW2d 756 (1988); *Temborius v Slatkin,* 157 Mich.App. 587, 597, 403 NW2d 821 (1986).

The Court of Appeals found that there was (a) no false statement; and (b) no way to build a claim for misrepresentation on an alleged fact that was promissory in nature. (Apx. 79a). The Court of Appeals rejected each of Alibri's alleged bases of misrepresentation. Therefore, the Court held that "[t]here can be no fraudulent or innocent misrepresentation without a false statement." (Apx. 79a).

The Trial Court improperly found that the Stadium Authority made innocent misrepresentations warranting rescission. Echoing the common theme of its order, the Trial Court ruled that the misrepresentations were related to the alleged inability to condemn immediately and the intent to purchase the Abraham property. The Trial Court should never have looked beyond the Option Agreement and the Warranty Deed on these questions. Having done so, however, it was still wrong as the Court of Appeals properly concluded.

A. Neither the Circumstances of the Transaction Or the Deed Conveying the Properties Support Plaintiff-Appellant's Position.

The Stadium Authority approached Alibri for the sole purpose of purchasing the subject properties for inclusion in the Stadium Project. At the time of the negotiations for the purchase

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of the property, it was public knowledge that the Stadium Authority was in the process of purchasing many parcels of land in an effort to comply with a deadline imposed by the entities involved in this Project. At the time of the negotiations, the Stadium Authority informed Alibri and her attorney, that her property was necessary for, and would be a part of, the Stadium Project. The Stadium Authority paid Alibri the price she demanded for her properties--a price that was in excess of the appraised value. As such, it is clear that the Stadium Authority wanted to purchase the subject properties for the Stadium Project. This ultimately was accomplished through the execution of warranty deeds. There is nothing in the warranty deeds for the subject properties indicating that the intent of the parties was other than an unfettered transfer of the interests of Freda Alibri to the Stadium Authority. (Apx. 65b).

The purpose of a deed is to convey title to land and not to describe the terms of a preceding contact under which the land was sold. *Goodspeed* v *Nichols,* 231 Mich. 308, 204 NW 122 (1925). It is a general rule that a deed must be construed according to its terms. *Kirby v Meyering Land Co,* 260 Mich. 156, 165, 168, 244 NW 433 (1932). If there is an ambiguity in the deed or if the deed fails to express the intent of the parties, an inquiry should be directed to that intent. *Taylor v Taylor*, 310 Mich. 541, 545, 17 NW2d 745 (1945).

In the matter at hand, the warranty deed reflects the clear intent of the parties to transfer title of the subject properties from Freda Alibri to the Stadium Authority without reservation. There is no ambiguity in the deed and, as such, there is no need to direct inquiry into the intent of the parties. The allegations raised by Alibri that her property was obtained by threats of condemnation[15] made pursuant to an invalid Resolution of Necessity and Declaration of Taking

[15]Plaintiff-Appellant misrepresents the alleged "threat of condemnation". The correspondence that Alibri relies on as proof of a "threat of condemnation" was provided to Plaintiff-Appellant for purposes of assuring that she could avail herself of benefits of § 1033 of the United States Tax Code. (Apx. 117a). It was not part of the consideration. It is a common practice in condemnation projects.

are clearly unfounded when viewed in conjunction with the Option for Purchase of Land which directly indicates that should the Option not be exercised, *the subject properties would not be condemned by the Stadium Authority*. The clear intent of the warranty deed is to pass title from Alibri to the Stadium Authority. That transfer was accomplished. As the Court of Appeals found:

> "[it] was known at the time plaintiff delivered the deed to the subject property that defendant had not purchased the Abraham property and her conveyance without reservation waived any future claim in that regard. A claim of innocent misrepresentation cannot be supported on a promise of future performance and cannot be supported without proof of detrimental reliance. (Apx. 79a.)

On January 3, 1997, Alibri knew there was no Abraham deal and that the Tigers were funding the purchase, yet she went forward. Why? Because she had her deal.

B. The Court of Appeals Is Right That the Trial Court Should Not Have Found Any Misrepresentations, Particularly When Based on Future Events.

The Trial Court should have granted Defendant-Appellee's motion because there was simply no reason to go beyond the plain language of the documents. Once the Trial Court did so, however, it should not have found that the Stadium Authority made innocent misrepresentations, especially on a motion for partial summary disposition. As discussed previously and as demonstrated by the Court of Appeals decision, there was no factual or legal basis for either of the Trial Court's bases for finding misrepresentation.

First, as discussed above, *supra*, the Stadium Authority had the ability to condemn Alibri's properties. The Trial Court's sole basis for this finding to the contrary was that, at the time of the execution of the Option Agreement, the Stadium Authority had no money in hand or plans in place under the UCPA. The Court of Appeals held that conclusion this was completely wrong. The plain language of the UCPA requires funding and a plan *at the time of*

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the filing of a condemnation complaint with the Court. There was no complaint filed in this case because Alibri and the Stadium Authority reached a negotiated arms-length sales transaction (which also precluded the Stadium Authority from ever condemning their properties). Thus, one-half of the Trial Court's reasoning failed as a matter of law.

Second, as discussed previously, there is no evidence of any misrepresentation regarding the intent to acquire the Abraham property at the time of the execution of the Option Agreement.[16] There was no language requiring or committing to that purchase.

It is a general rule that a promise of future conduct cannot be the basis of an action for misrepresentation. *Boston Piano & Music Co v Pontiac Clothing Co,* 199 Mich. 141, 147-48, 165 NW 856 (1917). Statements promissory in their character that one will do a particular thing in the future are not misrepresentations, but are contractual in their nature, and do not constitute fraud. *Hi-Way Motor Co v Int'l Harvester Co,* 398 Mich. 330, 339, 247 NW2d 813 (1976). A mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform it does not change its character. A representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time when it is made. *See generally, Boston Piano & Music, supra* at *146-48.*

In the case of *McMullen v Joldersma*, 174 Mich.App. 207, 435 NW2d 428 (1998), the Michigan Court of Appeals considered issues similar to the present matter. In *McMullen*, the plaintiffs, purchasers of a store, sought rescission of a land contract alleging that the sellers fraudulently concealed the material fact that the State of Michigan had plans to construct a highway bypass which would substantially divert all traffic away from the store. The court

[16]Even if conflicting evidence existed, at the least, an issue for trial would exist. Additionally, if, as Alibri alleged and the Trial Court found, there was an obligation to buy the Abraham property, then Alibri may have had a claim for breach of contract , a legal remedy, that would prevent rescission.

found there was no fraud or misrepresentation by the sellers with respect to the duty to disclose an action that might take place in the future, pending federal funding. Additionally, the court noted that the pertinent facts of the proposed project were a matter of public record and that the plaintiffs had employed a CPA to investigate the facts for them. The Court further held that the project was still ongoing several months after plaintiffs purchased the store and that final approval from the federal government was not obtained until well over one year from the purchase of the store. *McMullen,* 174 Mich.App. at 213-14.

The documentary evidence and deposition testimony make it clear that the Stadium Authority made no fraudulent misrepresentations and was under no mistaken belief when it sought to purchase the Alibri property for the Stadium Project. At all times, the Stadium Authority acted pursuant to documentation (i.e., the MOU, the original Concession Management Agreement and the Resolution of Necessity) - - all of which were a matter of public record. The 1996 Resolution of Necessity addressed the need to obtain property necessary for the implementation of the Stadium Project--the subject property was included in the Resolution of Necessity.

The Stadium Authority planned to purchase the Abraham property and went to great lengths to guarantee that if the Abraham purchase was completed, Alibri would receive the same purchase price per square foot that the Abraham's received from the Stadium Authority. The Stadium Authority guaranteed to Alibri, through the Option Agreement, that if the Option was not exercised, the Stadium Authority could not later "take" or obtain the Alibri property through eminent domain. It was not until May 1998, approximately one and one-half years after the closing on the subject property, that the specific locations for each stadium were determined and the need to acquire additional parking revised, and the Stadium Authority issued its

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Resolution Rescinding the Resolution of Necessity which set forth its determination that certain property located on the west side of Woodward Avenue no longer was required for the implementation of the Stadium Project.

V. THE COURT OF APPEALS JUSTIFIABLY HELD THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY DISPOSITION TO PLAINTIFF-APPELLANT BASED ON AN ALLEGED FAILURE OF CONSIDERATION

The Trial Court erred as a matter of law in ruling that consideration for the Option Agreement failed because:

(1) The Stadium Authority *subsequently* did not purchase the Abraham and Potestivo properties; and

(2) The Stadium Authority's representation regarding the viability of possible eminent domain proceedings when no money or plan were in place.

(Apx. 62a & 63a).

The Trial Court erroneously ruled that rescission of a portion of the Option Agreement was a proper remedy. The Court of Appeals rejected these conclusions:

> We have already concluded that the latter reason is based on misapplication of requirements to institute a complaint for condemnation to the alternative means of acquiring property through good-faith negotiations. Furthermore, the trial court's reasoning is fundamentally flawed by misconstruing motive for negotiating as consideration.
>
> * * * *
>
> The trial court correctly concluded that the Abraham clause was bargained for consideration. ...However, as discussed above, the clause did not obligate defendant to purchase the Abraham property; nor did this consideration fail.

(Apx. 77a). The Court of Appeals simply did not buy Alibri's premises. Nowhere in either the Verified Complaint for Injunctive Relief or the Verified Amended Complaint for Injunctive Relief does Plaintiff-Appellant allege a failure of consideration for the option agreement. Thus,

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the Trial Court erroneously decided an issue not properly before it.

A. The Trial Court Should Not Have Inquired Into the Adequacy of the Consideration.

The Court of Appeals properly held that the Trial Court erred as a matter of law by inquiring into the adequacy of the consideration for the Option Agreement. (Apx. 78a). Courts should not review the adequacy of consideration for an agreement:

> The consideration necessary to support a contract is a 'benefit to the promisor or a detriment to the promisee.' 1 Williston, *Contracts (1921)* § 102; *Sanford v. Huxford,* 32 Mich. 313, at page 315, 20 Am. Rep. 647; *Smith v. Maxey,* 186 Mich. 151, at page 165, 152 NW 1011; *Steep v. Harpham,* 241 Mich. 652, at page 656, 217 NW 787. ... It is not necessary that there be an equal exchange of consideration. The law does not inquire into the adequacy of the consideration. 1 Williston, *Contracts (1921),* § 115. It is enough if the consideration is given, in whole or part, in exchange for the promise.

Levitz v Capitol Savings & Loan Co, 267 Mich. 92, 96-97, 255 NW 166 (1934); *see Department of Nat Res v Board of Trustees,* 114 Mich.App. 99, 318 NW2d 830 (1982).

The Option Agreement on its face *unambiguously* establishes that consideration existed: the Stadium Authority would receive 16 parcels of property in exchange for paying nearly $6.5 million to Plaintiff-Appellant. Rules of contract construction required the Trial Court to refrain from looking beyond the four corners of the document.[17] In a case involving an insurance contract, this Court discussed the principles of contract interpretation:

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[17]Consequently, Plaintiff-Appellant's reliance on *Farm Bureau Mut Ins. Co. v Nikkel,* 460 Mich. 558, 596 N.W.2d 915 (1999), *Goodwin, Inc. v Orson E. Coe Pontiac,* 392 Mich. 195, 220 N.W.2d 770 (1979) and *NAG Enterprises, Inc. v All State Industries, Inc.,* 407 Mich. 407, 285 N.W.2d 770 (1979), is inapplicable to the issues before this Court. Plaintiff-Appellant is again improperly attempting to raise a new issue before this Court - this time, whether the Option Agreement was an "integrated" agreement. Plaintiff-Appellant has set forth arguments regarding her alleged motivation for entering into the Option Agreement; however, Plaintiff-Appellant has never claimed that the Option Agreement did not set forth the parties' complete agreement regarding the Stadium Authority's purchase of the Alibri east and west side properties. In fact, Plaintiff-Appellant has repeatedly argued that the Option Agreement is unambiguous. Since there has been no dispute up to this point regarding whether the Option Agreement was integrated, Plaintiff-Appellant has waived this issue and all related arguments concerning the application of the parol evidence rule.

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> An insurance policy is much the same as another contract; it is an agreement between the parties. *Auto-Owners Ins. Co. v. Churchman,* 440 Mich. 560, 566, 489 NW2d 431 (1992); *Moore v. First Security Casualty Co.,* 224 Mich.App. 370, 375, 568 NW2d 841 (1997). Any ambiguities in insurance contracts are liberally construed in favor of the insured and against the insurer, who drafted the contract. *State Farm Mut. Automobile Ins. Co. v. Enterprise Leasing Co.,* 452 Mich. 25, 38, 549 NW2d 345 (1996). This does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefitting an insured. *Upjohn Co. v. New Hampshire Ins. Co.,* 438 Mich. 197, 208 n. 8, 476 NW2d 392 (1991). The fact that a policy does not define a relevant term does not render the policy ambiguous. *Henderson v. State Farm Fire and Cas. Co.,* 460 Mich. 348, 354, 596 NW2d 190 (1999). This Court must interpret the terms of the contract in accordance with their commonly used meanings. *Group Ins. Co. of Michigan v. Czopek,* 440 Mich. 590, 596, 489 NW2d 444 (1992).

Morinelli v Provident Life & Acc Co, 2000 WL 1207451 (Mich.App. Aug 22, 2000); *see also, Cole v Ladbroke Racing Michigan,* 241 Mich.App. 1, 13-14, 614 NW2d 169 (2000)("The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity.") (citations omitted).

Here, there is no ambiguity. The Option Agreement spells out in plain language its terms. At the Stadium Authority's option, it could purchase 16 parcels owned by Alibri for the sum of nearly $6.5 million. The Stadium Authority exercised the Option and a closing occurred on January 3, 1997.[18] The plain language of the Option Agreement sets forth the consideration. As a matter of law, the Trial Court committed reversible error in looking at the issue of the

[18]Alibri originally argued that the only property that was purchased West of Woodward in the Project Area was hers. This is simply not true. Mr. Duggan testifies, unrebutted, that the Forbes property west of Woodward was also acquired. (Apx. 135a). The City of Detroit also transferred all of its property west of Woodward to the Stadium Authority. (Apx. 135a).

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adequacy of the consideration.[19]

B. The Abraham Non-Purchase Was Not A Failure of Consideration.

The Trial Court also erred in determining that the Stadium Authority's decision not to purchase the Abraham and Potestivo properties constituted a failure of consideration for the Option Agreement. Factually, there is no dispute that Defendant-Appellee had the authority to purchase the Abraham and Potestivo properties west of Woodward. The issue is whether there was a commitment by the Stadium Authority to purchase these properties which served as consideration for the Option Agreement. There was not; the Court of Appeals so held, reversing the Trial Court.

As discussed previously, the Option Agreement covered 16 properties owned by Plaintiff-Appellant. Plaintiff-Appellant agreed to sell these properties for the sum of nearly $6.5 million. Attachment B to the Option Agreement contained additional terms. These additional terms were drafted by Plaintiff-Appellant's attorney.[20] One of the additional terms, Item 3, states:

> It is further agreed between Optionor and Optionee that the per square foot price paid by Optionor for the property located on the

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[19]Assuming *arguendo* that the Trial Court was correct in deciding that part of the consideration for the Option Agreement was the intent to purchase the Abraham property and the intent to condemn in the absence of an agreement, the Trial Court still should never have looked beyond the document. Alibri covered both of these issues with conditional clauses *drafted by her attorney*. The clauses are clear and plain: (1) if the Stadium Authority did not exercise the option, then it would not condemn Alibri's properties on the west side; and (2) if the Stadium Authority purchased the Abraham properties, then Alibri would receive the *same* price paid by the Stadium Authority to the Abrahams. The Stadium Authority did exercise the option, thus ensuring no condemnation, and the Stadium Authority did not purchase the Abraham property, thus no obligation for additional payment by the Stadium Authority was created. If these two items were somehow found ambiguous (an issue the Trial Court never addressed), then the ambiguity must be construed against the drafter, in this case, Alibri.

[20]In her Brief on Appeal, Plaintiff-Appellant mischaracterizes the Stadium Authority's statements regarding who drafted the Option Agreement. The Stadium Authority has never stated that Alibri drafted the Option Agreement. The Stadium Authority has specifically and accurately stated that Alibri drafted the provisions of the Option Agreement that are in question. Based on this fact, if this Court were to determine that the language of item three of the additional terms was ambiguous, such ambiguities should be construed against Plaintiff-Appellant. *See, Morinelli, supra.*

> Westside of Woodward shall be equal to the price per square foot paid by Optionee (which includes the swapping of land or any other form of consideration) to the owners of the Parcel located on Elizabeth and Park Avenue for the property located on Elizabeth and Park Avenue (identified as Ward 2, item 413).

(Apx. 128a). This language is plain and unambiguous. This provision was an additional term requested by Plaintiff-Appellant to allay her concern that the Abrahams (owners of the referenced parcel) would receive a "sweetheart deal" from the Stadium Authority because of a relationship with Wayne County Executive Ed McNamara.[21] Nothing in this language obligated the Stadium Authority to purchase the property owned by the Abrahams west of Woodward.

Consideration for contracts is a bargain for benefit or detriment. *Plastray Corp v Cole*, 324 Mich. 433, 440, 37 NW2d 162 (1949). Ordinarily, courts will not review the adequacy of the consideration in a contract. *See Rose v Lurvey,* 40 Mich.App. 230, 198 NW2d 839 (1972). In this case, the Option Agreement is unambiguous on its face. The consideration for the Option Agreement covering the 16 Parcels was the promise to convey the Parcels to the Stadium Authority in exchange for nearly six and one half million dollars. The Court of Appeals concluded, rather generously, that this provision was a bargained for detriment if a purchase was made. It was not, however, a commitment to purchase the Abraham or any other properties west of Woodward. It could not fail because it was not required to happen.

C. <u>There Was No Failure of Consideration Based Upon the Ability to Condemn Immediately</u>.

The Trial Court clearly erred in its determination that consideration for the option

[21]Plaintiff-Appellant's real complaint appears to be that Olympia Entertainment (a sister corporation to the Tigers) ultimately purchased the property and that the ultimate purchaser was embroiled in some conspiracy with the Stadium Authority to evade this provision of the agreement. There is no evidence to support this strained version of the facts.

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agreement failed because of the Stadium Authority's representations regarding its eminent domain powers. The Trial Court found that the Stadium Authority had no present ability (at the time of execution of the Option Agreement) to condemn Plaintiff-Appellant's property because the Stadium Authority did not have the funds in hand and had no plans in place to use the subject property in the stadium project. (Apx. 61a & 62a). The Court of Appeals, as noted, rejected this nonsense.

Assuming *arguendo* that the Stadium Authority represented that it intended to condemn Plaintiff-Appellant's properties if no agreement were reached, in no way do such representations constitute consideration for the Option Agreement. Plaintiff-Appellant repeatedly argued at the June 30, 2000 hearing that legal consideration is the same as a party's motivation for entering into an agreement. As stated by Plaintiff-Appellant's counsel:

> The consideration - - and I think I tried to make this point earlier - - is, if you step back, the consideration is why was this deal done? Okay? And there are many reasons but each one of them is part of the consideration. And part of the consideration for why this deal was done was the Stadium Authority said: If we don't purchase it by sale, we are going to take it. (Apx. 133b).

The Trial Court's Order Granting Partial Summary Disposition was written by Plaintiff's counsel and adopted wholeheartedly by the Trial Court. Plaintiff-Appellant and the Trial Court grossly misinterpreted the meaning of meaning of legal consideration. (Apx. 71a). In *Rose v Lurvey, supra,* the Michigan Court of Appeals delineated the long held distinction between *motive* and *consideration*:

> What the trial court mistakenly referred to as consideration [peace of mind] was in actuality nothing more than the inducements and motives which influenced plaintiffs into making the contract. Inducements and motives are merely the subjective manifestation of the plaintiffs' own desires. They are not the bargained for exchange or legal detriment to defendants

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which is necessary to establish a legally valid contract.

> "The motive which prompts one to enter into a contract and the consideration for the contract are distinct and different things. Parties are led into agreements by many inducements, such as the hope of profit, the expectation of acquiring what they could not otherwise obtain, the desire of affording the loss, etc. These inducements are not, however, either legal or equitable consideration, and actually compose no part of a contract." 17 Am Jur. 2d, *Contracts,* § 93, pp. 436-437. 40 Mich.App. at 234-35.

In that case, the Court of Appeals "reach[ed] the conclusion that the transfer of equity in property worth $12,000 for $1.05 exhibited an inequality so strong as to amount to a gross inadequacy of consideration." *Id.* at 236. Long ago, the United States Supreme Court held similarly with respect to the distinction between motive and consideration.

> It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract on the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of the contract, but neither the expectation nor the result is 'the cause of meritorious occasion requiring a mutual recompense in fact or in law.' Surely a creditor may do a favor to his debtor, or may enter into a new or independent contract with him, induced by which the debtor may assent to giving a note for the previously-existing indebtedness. Without the favor of the new contract, there is in such a case a full consideration for the note, and the parties may not have contemplated that the favor of the new contract was to be paid for. To regard them as entering into the consideration of the note would be to make a contract for the parties to which their mind never assented. *Philpot v Gruninger*, 81 US 570, 577, 20 L.Ed. 743 (1871).

In this case, Plaintiff-Appellant's motivation for entering into the Option Agreement is

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irrelevant to a determination of the propriety of the consideration for that agreement.[22] As discussed previously, the consideration was the exchange of ownership of the parcels for money. Therefore, Plaintiff-Appellant's reliance on *Rosenthal v Triangle Development Co.*, 261 Mich 462, 463; 246 NW 182 (1933) is misplaced. Alibri got what she negotiated for—an agreement that the Stadium Authority would pay her the same price per square foot as it would the Abrahams, assuming the Stadium Authority purchased the Abraham property. Plaintiff-Appellant knew that the Stadium Authority's duty to perform would be triggered only if the Stadium Authority purchased the Abraham property. Based on her knowledge of this fact, Plaintiff-Appellant cannot now complain that the Stadium Authority's failure to buy the Abraham property was an unexpected defect. It was not part of the consideration.

The fallacy of Plaintiff-Appellant's argument is more fully illustrated when applied literally to the facts. If the Stadium Authority had purchased the Abraham property for less than what it paid Alibri for her west-side property, then, applying Plaintiff-Appellant's argument literally, Plaintiff-Appellant would owe money to the Stadium Authority. Certainly Plaintiff-Appellant did not bargain for this outcome. Given the possibility that such an outcome could have occurred and the undisputed fact that neither the Stadium Authority nor Plaintiff-Appellant could force the Abrahams to sell their property to the Stadium Authority, Alibri's interpretation of the Abraham provision of the Option Agreement is illogical. Alibri continues to confuse her motivation for executing the Option Agreement with bargained-for consideration. Alibri's

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[22]Throughout this litigation, Alibri has maintained that she sold her property to the Stadium Authority based on a "threat" of condemnation (*See* Plaintiff-Appellant's Application for Leave to Appeal at pp. 3, 18, 20, 21, 22, 27, 29, 30, 32 and 37). Now, for the first time, Alibri has modified the basis of her reliance to include representations allegedly made by the Stadium Authority regarding whether the subject property would be conveyed to the Detroit Tigers. Plaintiff-Appellant's Brief on Appeal at page 17 and 19. Since Alibri failed to allege reliance based on this fact at the Trial Court and at the Court of Appeals, this Court should not consider this new claim of reliance raised by Alibri in her Brief on Appeal to this Court. *ISB Sales Co., supra.*

reliance on *P.A.L. Investment Group, Inc. v Staff-Builders, Inc.*, 118 F.Supp.2d 781 (2000) is similarly misplaced. In this case, Alibri's claims are not based on a breach of the Option Agreement, but instead arise from Alibri's repeated efforts to replace the plain, unambiguous language of the Option Agreement with irrelevant facts relating to Alibri's motivation for entering into the Option Agreement.

D. The Facts Support the Court of Appeals' Opinion.

As the Court of Appeals ultimately did, the Trial Court should have granted the Stadium Authority's motion for summary disposition because it should never have gone beyond the plain, unambiguous language of the Option Agreement. Once the Trial Court made this error, it should not have compounded the mistake by granting Alibri's motion for partial summary disposition.

When viewed in the light most favorable to Defendant-Appellee, the evidence regarding the facts that existed at the time of the negotiation and purchase of the subject properties should have precluded the granting of Partial Summary Disposition for Plaintiff-Appellant. For example, Mr. Duggan's uncontroverted testimony (Apx. 133a & 134a), outlines the negotiations between the parties. The supporting documents and deposition testimony evince that the Stadium Authority acted within its legal and equitable parameters when it sought to purchase the Alibri property for the Stadium Project. At all times, the Stadium Authority acted pursuant to documentation which is a matter of public record. The valid 1996 Resolution of Necessity and Declaration of Taking addressed the need to acquire property necessary for the implementation of the Stadium Project--the subject properties were included in the Resolution of Necessity. The Stadium Authority planned to acquire the Abraham property for the Stadium Project and went to great lengths to guarantee that if the Abraham purchase was completed,

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Alibri would receive the same purchase price per square foot that the Abraham's received from the Stadium Authority. The Stadium Authority guaranteed to Alibri, through the Option Agreement, that if the Option was not exercised, the Stadium Authority would not later "take" or obtain the Alibri property through eminent domain. The testimony of Michael Duggan shows that (a) Alibi was informed of need for the subject properties, (b) the reasons why the Stadium Authority needed the west side properties, and (c) the Stadium Authority agreed to all of Alibri's demands. Viewed in a light most favorable to the Stadium Authority, such evidence establishes reversible error by the Trial Court which the Court of Appeals duly noted.

It was not until May 1998, approximately one and one-half years after the closing on the subject properties, that the specific locations within the Stadium Project Area for each stadium were determined and the need to acquire additional parking revised, that the Stadium Authority issued its Resolution Rescinding the Resolution of Necessity which set forth its determination that certain property located on the west side of Woodward Avenue no longer was required for the implementation of the Stadium Project. (Apx. 165a). Michael Duggan's unrefuted testimony is that the intent, or plan, of the Stadium Authority at the time of the negotiations, was to include all of the west side properties for parking for the Stadium Project in order that the Stadium Authority could provide the additional 2500 parking spaces that were demanded by the Detroit Lions. (Apx. 137a & 138a). There was no evidence that the Stadium Authority misled Alibri in order to purchase her property. The testimony and documentary evidence demonstrate that the purchase of the subject properties by the Stadium Authority was a negotiated, voluntary real estate transfer between the two parties. There was no illegal act on the part of the Stadium Authority to secure the purchase of the subject properties.

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E. The Tigers' Interests Are Not A Basis for Reversible Error.

The Trial Court appeared to find, and Alibri continues to argue, that the Stadium Authority purchased the subject properties for the sole purpose of turning it over to the Detroit Tigers. The Stadium Authority has explained why Mr. Jay Bielfield of the Detroit Tigers attended the real estate closing for the Alibri east and west side of Woodward properties. His role simply was to deliver a check. The reason for the check has been explained--the Stadium Authority did not have funds in January of 1997 to purchase properties on the west side of Woodward Avenue because west Woodward Avenue properties were to be purchased using funds from future parking bonds. (Apx. 135a). The bond funds were not in place on January 3, 1997.

At the time of the purchase of the subject properties, the Stadium Authority intended to repay the Detroit Tigers the purchase price of the subject properties from issuance of the future bonds. (Apx. 165a). In May 1998, when the Stadium Authority determined that the properties west of Woodward no longer were required for the Stadium Project, the Stadium Authority agreed to transfer the subject properties to the Detroit Tigers as repayment of the earlier loan. There is no evidence that these actions on the part of the Stadium Authority were false or misleading. No evidence exists that the Stadium Authority misled Alibri in order to purchase the subject properties. The unrefuted testimony of Michael Duggan, as well as the public records, show that there was an agreement in place for the Detroit Tigers and the Detroit Lions to loan money to the Stadium Authority for costs related to the Stadium Project.

Moreover, as noted above, Michigan court have held that it is not improper for an entity like the Detroit Tigers to contribute funding for public necessity acquisitions. *See Union Lime Co v Chicago & Northwestern, supra.* MCL 123.958 grants the Stadium Authority the authority

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to acquire land for parking in connection with the Stadia. The Stadium Authority's conveyance of the west side properties to the Detroit Tigers as repayment for the money it loaned the Stadium Authority to purchase the properties is not improper given that the MOU provides that the Detroit Tigers would utilize the west side properties in the same manner intended by the Stadium Authority - for parking in connection with the Stadia.

Michael Duggan's testimony was uncontroverted by any admissible evidence other than the speculative musings of Plaintiff-Appellant and Plaintiff-Appellant's counsel. Yet instead of properly granting the Stadium Authority's motion for summary disposition, the Trial Court first found that factual issues existed for trial and then granted Plaintiff-Appellant's Motion for Partial Summary Disposition. The Court of Appeals merely corrected this comedy of errors.

Alibri's reliance on *Gerycz v Zagalski,* 230 Mich. 381, 203 NW 65 (1925) is odd. In *Gerycz*, no consideration was exchanged. Here, consideration was received. Alibri just wants more. *Barbat v Arden Company,* 74 Mich.App. 540, 284 NW2d 779 (1977) is also inapposite. There the promise in question was clearly illegal. Here, the Court of Appeals found that there was no promise because there was no commitment to buy the Abraham property. Rosenfeld and Duggan both said it.

> "If the Stadium Authority bought it." (Apx. 93a).
>
> * * * *
>
> Alibri and the Stadium Authority negotiated and agreed that the per square foot price of the Subject Property would be equal to the per square foot price paid by the Stadium Authority to the Abrahams for their property on Elizabeth and Park Avenue if so acquired by the Stadium Authority. (Apx. 114a). (emphasis added).

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VI. THE COURT OF APPEALS DID NOT COMMIT REVERSIBLE ERROR BY FINDING THAT ALIBRI WAIVED HER CLAIM; NOR IS THIS CONCLUSION INCONSISTENT WITH THE DUGGAN AFFIDAVIT.

Plaintiff-Appellant appears to argue now that the Court of Appeals interjected a new legal theory into the proceedings at page 8 of its Opinion and that this new legal theory is inconsistent with the factual evidence in the case. Plaintiff-Appellant's reference to the Duggan Affidavit, which notes that the Stadium Authority would still pay Alibri the increased purchase price if it purchased the Abraham property for more at any point in time, is not germane. First, it did not happen. Second, the Stadium Authority's willingness to voluntarily acquiesce to this position does not change the conclusion that Alibri waived the claim.

Third, Plaintiff-Appellant's conclusions about whether the Stadium Authority had the obligation and the power to acquire the Abraham property is simply unsupported by any reference to the record. The Duggan affidavit does not create an obligation to purchase the Abraham property. Alibri's lamentations are merely the musings of a disgruntled party facing reality for the first time. The Stadium Authority may be willing to be fair, however, such fairness does not impact the legal effect of Alibri's waiver.

Plaintiff-Appellant's conclusions regarding the authority relied on by the Court of Appeals again appears to be unsubstantiated hyperbole without case law support. Whether it was a condition precedent or condition subsequent appears to be irrelevant for these purposes. Whatever the condition, it never manifested itself at the time of execution and delivery of the deed. It still has not manifested itself. There was no obligation that the Stadium Authority had to purchase the Abraham property. Plaintiff-Appellant continues to ignore this basic distinction and difference espoused by the Stadium Authority and adopted by the Court of Appeals.

The facts are not in dispute. Alibri deeded her property to Defendant-Appellee before

she knew whether the Abraham purchase had been, or could be consummated. Given the facts, the question is whether there was a waiver. The Michigan Court of Appeals in *Bielski v Wolverine Insurance Co.,* 2 Mich.App. 501, 505, 140 NW2d 772 (1966), *quoting Garvy v Blatchford Calf Meal Co.,* (CCA 7, 1941), 119 F2d 973 held:

> Whether facts on which a claim of waiver is based have been proved, is a question for the trier of facts, but whether those facts, if proved, amount to a waiver is a question of law.

See also *Madison Public Schools v Myers,* 247 Mich.App. 583, 588, 637 NW2d 526 (2001), where the Michigan Court of Appeals held:

> We review de novo the question of law whether the relevant circumstances establish a waiver of the right to arbitration.

The question of waiver is an issue of law because it is grounded in the equitable notion of estoppel. *South Macomb Disposal Authority v American Ins. Co.,* 225 Mich.App. 635, 572 NW2d 686 (1997). The Michigan Court of Appeals could legitimately review and raise issues of law where all of the facts have been presented even if the issue is not raised by a party below:

> However, this Court may review issues that were not decided by the trial court where the issue is one of law and all the necessary facts were presented. *Kosko v June's Trucking,* 244 Mich.App. 162, 168, 625 NW2d 82 (2001).

See also *Camden v Kaufman,* 240 Mich.App. 389, 613 NW2d 335 (2000), and *Black v Joe Panian Chevrolet,* 239 Mich.App. 227, 608 NW2d 89 (2000).

Defendant-Appellee further notes that the impact and implications of execution and delivery of a deed were in fact raised in its original brief below. *Defendant-Appellee Brief on Appeal at pp. 39 and 40.* Given that fact, it is not an unreasonable leap to argue that delivery of that deed in fact waived the condition. Moreover, the case cited by the Michigan Court of Appeals in support of this proposition [*Tolksdorf v Griffith,* 464 Mich. 1, 626 NW2d 163

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(2001)], had not even been decided at the time of submission of the briefs in this matter.

VII. THE EQUITIES IN THIS CASE DID NOT SUPPORT RESCISSION

The Michigan Court of Appeals found that the equitable considerations raised by the Trial Court did not warrant rescission. Plaintiff-Appellant has argued vehemently throughout other sections of its brief that this was not a takings case. However, when faced with the equity issue, Plaintiff-Appellant suddenly, and conveniently, concludes that the broader constitutional embellishments of a takings proceeding under the UCPA governs how this Court and the Court of Appeals should review this matter.[23] Alibri's citation to *In Re Condemnation of Land,* 211 Mich.App. 688, 536 NW2d 598 (1995) is curious. There, the Court of Appeals held that UCPA provides standards for an agency's acquisition of land. The UCPA also includes MCL 213.72, MSA § 8.265(21). This provision authorizes the sale of land acquired by an agency.

The ultimate disposition of the property should be irrelevant. If the acquisition pursuant to MCL 123.951 et seq. was permissible, "the validity of the disposition must be measured without reference to the acquisition." *Sinas v City of Lansing,* 382 Mich 407, 170 NW2d 23, 24 (1969).

The Court of Appeals Opinion in *Oakland Hills v Lueders Drain,* 212 Mich.App. 284, 537 NW2d 258 (1995), simply does not stand for the proposition for which it is cited. *Lueders Drain* merely reinforces that a condemning authority must comply with the pre-condemnation

[23]Despite the fact that this is not a "takings" case, Plaintiff-Appellant expends pages of her Brief on Appeal pontificating on the Stadium Authority's alleged abuse of its eminent domain power. First, Plaintiff-Appellant's logic regarding this issue is fundamentally flawed because it is premised on Plaintiff-Appellant's and the Trial Court's erroneous interpretation of the UCPA. The Court of Appeals recognized that the Stadium Authority acted within the confines of the UCPA during its negotiations with Plaintiff-Appellant. Further, it is undisputed that the Stadium Authority did not initiate condemnation proceedings against Alibri. Therefore, the caselaw and arguments set forth by Alibri in this regard should not be considered because they are not being applied to the facts of this case but to a hypothetical "taking" that did not happen. While Alibri attempts to characterize herself as the hapless victim of the Stadium Authority, the facts demonstrate that Alibri is a savvy and sophisticated business person who negotiated a deal that barred the Stadium Authority from condemning her properties and also resulted in Alibri obtaining top dollar from the voluntary sale of her properties to the Stadium Authority.

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requirements of the UCPA. Here, there is no question that the Stadium Authority complied with those requirements. In fact, this entire purchase was an arrangement derived from pre-condemnation negotiations, as the Michigan Court of Appeals duly noted in this case. The Stadium Authority always had the power to condemn. That it never got to the point of having to file a complaint and comply with all of the nuances associated with a condemnation complaint simply cannot give rise to a failure of consideration or an equitable claim.

Poletown Neighborhood Council v Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) is inapplicable and irrelevant to the facts of this case. In *Poletown, supra,* the issue was whether the Michigan Legislature's determination that economic development was a public use was a constitutional enactment. Here, the acquisition of land by the Stadium Authority for use for parking in connection with the Stadia was clearly a public use. MCL 123.958. Plaintiff-Appellant has not challenged the constitutionality of the Stadium Authority's ability to acquire land, whether by purchase or by condemnation, for use as parking. Plaintiff-Appellant's arguments regarding the benefit purportedly received by the Detroit Tigers were considered by the Michigan Court of Appeals in this case and soundly rejected. There is no evidence established in this case that the Tigers were the primary beneficiary of this acquisition.

Plaintiff-Appellant's position regarding the creation of some new nefarious power in condemning agencies contradicts the plain language of the UCPA which provides, in part:

> If property is acquired by an agency, the agency may lease, sell, or convey any portion not needed, on whatever terms the agency considers proper. MCL 213.72.

The Stadium Authority is not doing indirectly what it could not do directly. It had the direct right under the UCPA to sell this property or convey this property to the Tigers in exchange for forbearance on the loan. Further, this latest novel argument by Alibri was not raised below. It

is a new argument that does not support the weight of the authority cited for it. See, e.g., *Shizas v Detroit,* 333 Mich. 44, 52 NW2d 589 (1952), and *City of Centerline v Chmelko,* 164 Mich.App. 251, 416 NW2d 401 (1987). This was never a necessity case and was never tried as a necessity proceeding. Plaintiff-Appellant is simply wrong. The Court of Appeals Opinion is supported by the great weight of authority and the UCPA.

VIII. EVEN THOUGH THE COURT OF APPEALS DID NOT ADDRESS THE ISSUE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RENDERING INCONSISTENT DECISIONS, FINDING FIRST THAT THERE WERE FACTUAL ISSUES FOR TRIAL, THEN FINDING, BASED ON THE SAME INFORMATION, THAT THERE WERE NO FACTUAL ISSUES.

The Trial Court committed manifest error mandating reversal by its inconsistent rulings on whether genuine issues of material fact existed. As discussed previously, the Trial Court determined that genuine issues of material fact existed for trial three times, most recently in December, 1999. On the eve of trial, on July 11, 2000, based on the same set of facts that existed in this case in December, 1999, the Trial Court ruled that there were no genuine issues of material fact for trial and granted Plaintiff's Motion for Partial Summary Disposition. These contradictory rulings demonstrate manifest error requiring reversal. The Court of Appeals did not rule on this issue.

In *Federal Deposit Ins Corp v Garbutt,* 142 Mich.App. 462, 370 NW2d 387 (1985), the Michigan Court of Appeals reversed a Trial Court's judgment because of the lower court's inconsistent findings. As the Court of Appeals noted:

> In this case, the trial court expressly stated that there was no evidence of any payments on the note, either of principal of interest. The court did refer to the Design 4, Inc., check which FDIC claims as evidence of Defendant's payment on the note which stated that "I don't know what that has to do with Mr. Garbutt individually so therefore I am not willing to accept that." Despite these findings, the court proceeded to award FDIC the face value of the note (minus certain costs) despite the fact that

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> the note had matured over six years prior to the filing of the initial Complaint.
>
> We find the trial court's inconsistency puzzling and we are unable, from this appellate removes, to harmonize those divergent findings and conclusions.
>
> * * * *
>
> Because of the trial court inconsistent findings, we are compelled to set aside the judgment and to remand for further findings and for clarification. As stated by Justice Cardozo, in *United States v. Chicago, and N, ST. P. & P.R. CO.,* 294 US 499, 511, 55 S. CT. 462, 467, 79 L ED 1023 (1935): "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." It is not the function of this Court to speculate as to the meaning of the contradictory findings and judgment. 142 Mich App at 469-470. *See also Schumaker v Macomb-Oakland Regional Center,* 192 Mich.App. 85, 480 NW2d 582 (1991).

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In *Bogrette v Young,* 132 Mich.App. 431, 347 NW2d 193 (1984), the Court of Appeals reversed a trial court's ruling based on its inconsistencies. A law firm had performed work for individual defendants as officers of a corporation. The firm was seeking the right to make a claim in the receivership proceedings involving the corporation. The trial court held that the firm had performed work for the individuals for their benefit and not for the benefit of the corporation, based on a finding that the corporation was never a bona fide church. The Michigan Court of Appeals held:

> We believe that the trial court's ruling is inconsistent with the facts set forth in the record. Defendants were undeniably officers of the corporation, and they retained appellant not to represent their individual interests, but primarily to defend the original action against the corporation itself, and to oppose dissolution and receivership. The court's own order dissolving the corporation implicitly acknowledges that the individual defendants were sued primarily in their corporate capacity; the court referred to them as "defendant officers of the corporation". We conclude that appellant was in fact representing the corporation, and that the trial court erred in characterizing

> appellant's work as having been solely on behalf of individual defendants.

Id. at 433-34. Likewise, in this case, the Trial Court ruled that factual issues existed for trial, particularly related to the intent of the parties. The Trial Court's subsequent ruling, based on the same disputed facts, that there was no issue for trial was inconsistent and also warranted reversal. *See Beasley v Washington*, 169 Mich.App. 650, 427 NW2d 177 (1988) (jury found no serious impairment in auto case, but awarded $40,000 in damages).

The Court of Appeals also reversed a conviction based on the trial court's inconsistent findings during a criminal bench trial. In *People v Fairbanks,* 165 Mich.App. 551, 419 NW2d 13 (1987), this Court held:

> Why would the court believe the complaining witness, or at least state that he believed her because she identified the defendant's house, her hair was wet, and she was in that house for some purpose and yet disbelieve her on the critical element of whether or not the defendant possessed a firearm? Furthermore why would the court disbelieve the complaining witness as to one of the counts of criminal sexual misconduct and believe her as to the other? *It was apparently a case of reducing the prosecutor's charge to comport with some idea of equity or some element of fairness and to reduce the charge to an included offense.* We find the facts do not support the trial court's findings or conclusions that there was an assault within the meaning of MCL § 750.520g(2); MSA § 28.788(7)(2) because the only aggravating circumstance applicable in this case was possession of a firearm, as to which the trial judge specifically found in favor of the defendant, although inexplicably so. 165 Mich.App. at 557 (footnote omitted) (emphasis added).

As in *Fairbanks,* similar questions arise from the Trial Court's conduct here. Why indeed would the Trial Court deny one Motion for Summary Disposition because of the existence of material facts for trial and grant the other party's Motion based on the same "facts" and circumstances, suddenly finding no issue of fact? Was it a trial judge imbued with a dislike of condemnation proceedings predetermined to fashion a ruling to comport with his idea of equity

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and fairness? If so, as in *Fairbanks,* reversal was appropriate.

In this case, the Trial Court's two decisions regarding the existence of genuine issues of material fact are irreconcilable and cannot be harmonized. This alone is error so manifest as to warrant reversal, which the Court of Appeals did albeit on other grounds.

RELIEF REQUESTED

For all the foregoing reasons, Defendant-Appellee asks this Court to enter its Order denying Plaintiff-Appellant's Application for Leave to Appeal and her Request for Peremptory Reversal.

Respectfully submitted,

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Dated: February 11, 2004

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the attorney(s) of record of all the parties in the above cause by serving same on them at their respective business addresses as disclosed by the pleading of record herein on the 12 day of February by:

__X__ U.S. Mail _____ Facsimile

_____ Hand Delivery _____ Overnight Mail

_____

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